Supreme Court of the United States

REPLY BRIEF OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 540

WES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO,

PETITIONER

v.

NATIONAL MEDIATION BOARD; LEVERETT EDWARDS, Individually and as Chairman of the National Mediation Board; FRANCIS A. O'NEILL, Jr., Individually and as Member of the National Mediation Board; ROBERT O. BOYD, Individually and as Member of the National Mediation Board; WESTERN AIR LINES, INC., Intervenor; SECOND OFFICERS' ASSOCIATION, Intervenor,

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER

1. The short answer to the objections based upon bypassing the Court of Appeals, the only ground of the Govern-

ment Opposition and the primary ground of the others, Western Opp. 9, SOA Opp. 6-8, is "that the Court has granted such petitions in cases where the same issue was already before the Court in another case." Memorandum for the Government, *Taylor* v. *McElroy*, No. 504, October Term, 1958, p. 5, with ample citation of authority. Petitioner here is of course assuming that the Court will have granted the companion petition in the *UNA Chapter* case, No. 531 of the current Term, being considered herewith. There can be no doubt that this case adds "a broader factual basis" for the Court's consideration of the judicial review issues, and such "broader factual basis" is the rationale for the bypassing of the Court of Appeals. Memorandum for the Government, *Taylor* v. *McElroy*, No. 504, October Term, 1958, p. 4. The "common question concerning the availability of judicial review" in *UNA Chapter* and this case is conceded. Gov. Opp. 3. Accordingly, there is every reason and authority under Rule 20 to grant this petition at this time.

2. The contention that the *Accardi* rule is irrelevant because confined to "procedural" matters is fanciful. Western Opp. 10-11, SOA Opp. 9. No such categorization is in point because the rule applies to *all* "Regulations" for they have "the force and effect of law". *Accardi* v. *Shaughnessy*, 347 U.S. 260, 265. "In short, so long as the regulations remain operative," the agency must adhere to them scrupulously. *Id.* at 267. The "principles established" in *Accardi* are "that regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the adminsitrative action under review is discretionary in nature." *Service* v. *Dulles*, 354 U.S. 363, 372.[1]

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[1] The quotation regarding "procedural sword" is not from the opinion of the Court in *Vitarelli* v. *Seaton*, a fact unmentioned at Western Opp. 10. As indicated in the quotation in the text, it is irrelevant whether or not the Board actions here were "discretionary" or "reasonable". Western Opp. 12, SOA Opp. 8-9.

3. As regulations have the force of law, the attempted distinction of *Leedom* v. *Kyne* fails. See Western Opp. 10, SOA Opp. 9. There is jurisdiction to adjudicate petitioner's claim that the Board has plainly violated an express mandate of the law relating to employees' rights in bargaining groupings and elections, just as there was in *Leedom* v. *Kyne*.

4. Petitioner's claim which must be asumed valid in reviewing a judgment of dismissal for failure to state a claim upon which relief could be granted is that the Board had no legal authority under its regulations to deny the flight engineers it represents the right to vote in this vital election. Petitioner does not claim that the Board admitted its violation. "It would be naive to expect such a heavy-handed way of doing things." *Accardi* v. *Shaughnessy*, 347 U.S. 260, 267. This Court must determine whether or not petitioner should have been afforded an opportunity to prove his claim. The ultimate propriety of the Board's order is not here in issue; that remains to be tried and decided. The issue here is judicial power to afford relief should petitioner's claim be proved. At this procedural stage, it may be reiterated, there is no possible contradiction of the allegations of petitioner's complaint. Indeed, at no point has the Board indicated the basis, if any, for its action; nor the consideration, if any, given the contentions raised by petitioner at the time or those now being raised by respondents to forestall review of this important issue by this Court.

5. On the due process and statutory interpretation issues involved in the delineation of the Board's obligations when an issue of unlawful employer assistance is put before it, respondents rely most heavily on *Switchmen's Union* Western Opp. 13-14, SOA Opp. 8-11. But they make no effort to distinguish the *subsequent Railway Conductors* case, 323 U.S. 166, in which certiorari was granted by this Court because of the manifest importance of these issues; and the issues were not resolved only because the Board was not a party respondent. Those issues remain for the

consideration of this Court; and this case is a suitable instrument for such consideration.

6. The general importance of this case is emphasized if it is indeed the fact that the Board actions here present "a garden variety" example of its procedures and decisions. SOA Opp. 9. For any other agency, it would be most extraordinary to be routinely charged with actions plainly excessive under the agency's own regulations and its governing statute. Whether or not this Board has in fact made a habit of disregarding the law—and if so, whether this habit has been created or encouraged by the Board's patent assumption that it is insulated from judicial review however highhanded its conduct—the governing consideration here is that jurisdiction to adjudicate this petitioner's claims of excessive actions in this case has been denied by the Court below; and that this denial plainly violates the strictures of this Court in *Accardi* v. *Shaughnessy* and *Leedom* v. *Kyne*.

CONCLUSION

For the reasons spread upon the papers in this case and the companion *UNA Chapter* case, this petition should be granted, and this case set down for argument together with *UNA Chapter*.

Respectfully submitted,

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